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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

HAZEL WALSH,

Case No. 3:11-cv-00050-JSW

Plaintiff,

**STIPULATED ORDER FOR  
INJUNCTION**

v.

KINDRED HEALTHCARE, INC., et al.,

Defendants.

Pursuant to the parties' stipulation, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows.

As referenced herein, the term "Class Counsel" means counsel of record for the Class Plaintiffs, specifically, Stebner and Associates; The Law Offices of Michael D. Thamer; The Arns Law Firm; Janssen Malloy LLC; Lieff, Cabraser, Heimann & Bernstein, LLP; and McKenna Long & Aldridge LLP.

As referenced herein, the term "Defendant Facilities" means only the following entities: Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Village Square, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Rehabilitation – Golden Gate; Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Tunnell Center, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Healthcare – Victorian, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Transitional Care – Santa Cruz, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Lawton, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Healthcare – Livermore, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Canyonwood, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Valley Gardens, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Bay View, Bayberry Care Center LLC d/b/a Kindred Nursing and Healthcare – Bayberry, Medical Hill Rehab Center, LLC, d/b/a Kindred Nursing and Rehabilitation – Medical Hill, Ygnacio Valley Care Center, LLC, d/b/a Kindred Nursing and Rehabilitation – Ygnacio Valley, Hillhaven – MSC Partnership d/b/a Kindred Nursing and Rehabilitation Nineteenth Avenue, Pacific Coast Care Center, LLC d/b/a Kindred Nursing and Transitional Care – Pacific Coast, Greenbrae Care Center, LLC, d/b/a Kindred Transitional Care and Rehabilitation Larkspur, Smith Ranch Care Center, LLC, d/b/a Kindred Transitional Care and Rehabilitation Smith Ranch, Care center of Rossmoor, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Walnut Creek, Foothill Nursing Company Partnership d.b.a Kindred Transitional Care and Rehabilitation – Foothill, Siena Care Center, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Siena, Kindred Transitional Care and Rehabilitation-Fifth



1 Avenue f/k/a Fifth Avenue Health Care Center.

2 This Court has jurisdiction over the Defendant Facilities, the Plaintiffs and all claims  
3 asserted in this action.

4 **COMPLIANCE WITH LAW**

5 1. At all times, each of the Defendant Facilities shall comply with Health and Safety  
6 Code section 1276.5 by providing a minimum of 3.2 actual nursing hours per patient day  
7 (“NHPPD”) (herein the “3.2 NHPPD requirement”). Pursuant to Health & Safety Code  
8 section 1276.5(b), “nursing hours” means the number of hours of work performed per patient day  
9 by aides, nursing assistants, orderlies, registered nurses and licensed vocational nurses (excluding  
10 Directors of Nursing in facilities of 60 beds or larger capacity) who perform direct nursing  
11 services. Only direct caregivers shall be counted toward NHPPD. Notwithstanding the foregoing,  
12 “nursing hours” includes the number of hours of work performed per patient day by Directors of  
13 Nursing who perform direct nursing services when such Directors of Nursing have worked more  
14 than 8 hours in one day or more than 40 hours in one week, as long as these additional nursing  
15 hours are separately and properly documented and confirm that such direct nursing services were  
16 provided to residents.<sup>1</sup> A person serving as an Assistant Director of Nursing or a Director of Staff  
17 Development can be a direct caregiver when providing direct care nursing services beyond the  
18 hours required to carry out the duties of these positions, as long as these additional direct care  
19 nursing hours are separately and properly documented. In order to count for purposes of the 3.2  
20 NHPPD requirement, an “aide” or “orderly” must qualify as a “nurse assistant” as that term is  
21 defined in Health and Safety Code sections 1337(d)(1) and 1337.5.

22 2. At all times, the Defendant Facilities shall comply with Health and Safety Code  
23 section 1599.1(a) by employing an adequate number of qualified personnel to carry out all of their  
24 respective facility’s functions. Without limitation, this paragraph shall require that the Defendant  
25 Facilities employ<sup>2</sup> an adequate number of qualified nursing personnel to provide skilled nursing

26 <sup>1</sup> “Properly documented” means the documentation described in Section 6 of the California  
27 Department of Public Health’s “All Facilities Letter” dated January 11, 2011.

28 <sup>2</sup> “Employ”, for purposes of this Injunction, shall mean “to use on a daily basis”.

1 services (as that term is defined in 22 California Code of Regulations (“CCR”) section 72309) at  
2 the Defendant Facilities.

3 3. Throughout the term of this Injunction, the Defendant Facilities shall budget to  
4 staff each Defendant Facility at not less than 3.4 NHPPD. Nothing stated herein shall relieve the  
5 Defendant Facilities of the obligation to provide sufficient staffing at levels in excess of 3.4  
6 NHPPD to the extent required based on patient acuity or other applicable factors.

7 4. At all times, the Defendant Facilities shall comply with the provisions of 42  
8 C.F.R. section 483.30(e) and Health and Safety Code section 1276.65(f) (herein the “Posting  
9 requirement”) by posting the following information in a prominent public place at the Defendant  
10 Facilities: (a) the actual direct care nursing hours for each shift; and (b) the resident census for  
11 each day. In addition, the Defendant Facilities shall retain the daily posted nurse staffing sheets  
12 for the term of this Injunction, or the period required under applicable law, whichever is longer.

13 5. At all times, the Defendant Facilities shall comply with 22 CCR section 72327 by  
14 employing a Director of Nurses eight hours a day on the day shift, five days out of each week  
15 throughout the year, at the Defendant Facilities (herein the “DON requirement”).

### 16 **THIRD PARTY MONITOR/COMPLIANCE REPORTS**

17 6. A third party monitor (“Monitor”) shall be appointed to review Compliance  
18 Reports (defined below) submitted by the Defendant Facilities and undertake all other necessary  
19 actions to monitor the Defendant Facilities’ compliance with the terms of this Injunction. All fees  
20 and costs of the Monitor shall be paid by Defendants up to a maximum of \$100,000 in total; any  
21 fees and/or costs exceeding that amount shall be borne solely by Plaintiffs’ counsel, provided that  
22 there will be no cap on monitor expenses in the event Defendants violate the injunction. Class  
23 Counsel shall select the third party Monitor.

24 7. As referenced herein, the “Final Effective Date” means (a) if no appeal from the  
25 Judgment is filed, the date of expiration of the time for the filing or noticing of any appeal from  
26 the Judgment; or (b) if an appeal from the Judgment is filed, and the Judgment is affirmed or the  
27 appeal dismissed by a judgment or order of the California Court of Appeal (“Appellate  
28 Judgment”), thirty days after the date of such affirmance or dismissal; or (c) if a petition for



review of the Appellate Judgment is filed and denied, the date the petition is denied; or (d) if a petition for review of the Appellate Judgment is filed and granted, or the California Supreme Court orders review of the Appellate Judgment on its own motion, and the Appellate Judgment is affirmed or the review proceeding dismissed, and no petition for a writ of certiorari with respect to the California Supreme Court's judgment affirming the Appellate Judgment or dismissing the review proceeding ("Review Judgment") is filed, the date of expiration of the time for the filing of such a petition for a writ of certiorari; or (e) if such a petition for a writ of certiorari is filed and denied, the date the petition is denied; or (f) if such a petition for a writ of certiorari is filed and granted, the date of final affirmance of the Review Judgment or final dismissal of the review proceeding initiated by the petition for a writ of certiorari; or (g) should there be no objections to the settlement filed and ultimately ruled upon by the trial court, the date of final approval of the settlement by the trial court.

8. Commencing on October 1, 2013, and for each quarter thereafter, as long as this Injunction is in effect, each of the Defendant Facilities shall provide the Monitor with a quarterly report, delivered on or before the 25th day of the third month of each quarter, that contains all of the following information (herein, "Compliance Report") for that Facility: (a) the actual nursing hours for each day during the prior 90-day period (the "reporting period"); (b) the resident census for each day during the reporting period<sup>3</sup>; (c) the NHPPD for each day during the reporting period; (d) the hire date, enrollment status, and the training commencement date for each nurse assistant who is not yet certified, if any, whose hours have been included in the NHPPD calculation during the reporting period; (e) the documentation described in Section 6 of the California Department of Public Health's AFL dated January 11, 2011 for all Nursing Hours claimed for the Director of Nurses, the Assistant Director of Nurses, the Director of Staff Development and for any other personnel with primarily administrative and/or non-nursing titles

<sup>3</sup> "Resident Census" means the number of residents in the facility on any given calendar day as set forth in the Department of Public Health's Form 612. If the method of calculating the "Resident Census" is changed by the Department of Public Health during the existence of this Injunction, the "Resident Census" to be provided with the Compliance Report shall be calculated and reported as is then required by the Department's rules and regulations.

1 or duties; and, (f) documentary evidence demonstrating actual dates, hours and assignments of all  
2 registry personnel providing direct nursing care when said personnel's hours are included in the  
3 NHPPD.

4 9. In the event that a question is raised by the Monitor with respect to information  
5 contained in a Compliance Report, the Monitor shall request in writing clarifying information or  
6 data from the Defendant Facilities in question. The Defendant Facilities shall provide a full and  
7 complete response to any such request to the Monitor not later than fifteen (15) calendar days after  
8 receiving the request.

9 10. Upon request in writing by the Monitor, Defendant Facilities shall provide to the  
10 Monitor the applicable electronic payroll data and Resident Census reports (collectively, the  
11 "Backup Data") for any Defendant Facility for the three month period immediately preceding the  
12 request, provided that: (a) the request shall be limited to three (3) or fewer Defendant Facilities per  
13 each Compliance Period; and (b) Defendants shall be provided with not less than fifteen (15)  
14 calendar days to produce the Backup Data.

15 11. The data described in paragraphs 8 to 11 of this Agreement shall not be used by the  
16 Monitor or Class Counsel for any purposes other than overseeing compliance with this Injunction.

17 12. The data provided to the Monitor under paragraph 8(c) of this agreement—the  
18 NHPPD for each day during the reporting period—shall be provided to Class Counsel. No other  
19 data referenced in paragraphs 8 to 11 of this Agreement will be provided to Class Counsel unless  
20 the Monitor determines that the Defendant Facilities violated the terms of this Injunction. Class  
21 Counsel may only use this data to enforce the Injunction in this lawsuit.

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23  
24 **OTHER PROVISIONS**

25 13. Nothing stated in this Injunction shall relieve the Defendant Facilities, or any of them,  
26 from complying with any other applicable federal or state law or regulation.

27 14. This Injunction shall be effective as of July 1, 2013 and shall remain in full force until  
28 June 30, 2015. If any of the Defendant Facilities violate the terms of this Injunction, however,



1 Plaintiffs may seek a Court order extending the Injunction duration, in addition to any other  
 2 available remedy. Any such extension, however, shall be limited to only the Defendant Facility  
 3 that did not comply with the terms of this Injunction.

4 15. The Court shall retain continuing jurisdiction over all parties and over this action to  
 5 enforce the terms of this Injunction.

6 16. Without limitation to the Defendant Facilities' obligations to comply with applicable  
 7 law and this Injunction and for purposes of enforcement of this Injunction only, the parties agree  
 8 as follows:

9 16.1 Plaintiffs will not seek to enforce the terms of this Injunction unless: (a) any  
 10 one of the Defendant Facilities fail to meet the 3.2 NHPPD or DON requirements on three  
 11 or more days in any Compliance Report; (b) any of the Defendant Facilities fail to meet the  
 12 Posting requirement on four or more days in any Compliance Report; (c) all Defendant  
 13 Facilities combined have 15 or more violations of the 3.2 NHPPD requirement in any  
 14 Compliance Report; (d) all Defendant Facilities combined have 15 or more violations of  
 15 the DON requirement or the Posting requirement in any Compliance Report, or (e) an  
 16 Enjoined Party fails to provide a timely and complete Compliance Report.

17 16.2 Prior to filing any motion to enforce the Injunction, Plaintiffs shall first  
 18 provide Defendants with not less than 7 (seven) calendar days notice within which to show  
 19 that no violation occurred; or that Court intervention is not warranted because (if  
 20 applicable) the non-compliance was caused by fire, flood, earthquake, disease outbreak or  
 21 some other cause completely beyond the control of Defendants. Plaintiffs will not seek to  
 22 enforce the Injunction against any Facility employees.

23 **IT IS SO ORDERED, ADJUDGED AND DECREED.**

24 DATED: December 16, 2013

  
 The Honorable Jeffrey White  
 United States District Court Judge

26 **SO STIPULATED:**

27 DATED: 12/6/13

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Christopher J. Healey  
McKenna, Long & Aldridge LLP  
Attorneys for Plaintiffs

DATED: 12/6/13

Brad Seiling  
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